NO. 87-546

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

UNITED AUTO WORKERS, LOCAL 422,

PETITIONER

v.

AUGUSTINO TOSTI,

RESPONDENT

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME
JUDICAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN J. C. HERLIHY*
KAREN M. THURSBY
HERLIHY AND O'BRIEN
133 FEDERAL STREET
BOSTON, MA 02110
(617)426-6100

*COUNSEL OF RECORD

EDITOR'S NOTE

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STATUTORY PROVISION

The respondent disputes the Local's citation of Title 29 U.S.C. sec.158 (b)(1)(B) on the grounds that (1) the applicability of this statute has never been presented or argued to any court at any time during the 14 year history of this action in the Massachusetts court system, and (2) it does not apply to the facts of this case as there is simply nothing in the record on which to base a finding that Augustino Tosti was an employer representative for purposes of collective bargaining or the adjustment of grievances.

STATEMENT OF THE CASE

Initially, it is the respondent's position that due to the many editorial comments, deviations from the facts as proven and found by the jury and the

Local's obvious attempts to interject irrelevant considerations including arguments never presented to the state court and issues waived below into its Petition for Writ of Certiorari, it would be appropriate for this Court to deny the Local's Petition pursuant to Supreme Court Rule 21.5.

For example, the Local's Petition makes no attempt to establish the appropriateness of Certiorari in light of the considerations set forth in Supreme Court Rule 17. The reason for this is that none of these considerations apply to this case. The Massachusetts Supreme Judicial Court has scrupulously followed the decisions of this Court in every respect during the three appeals presented to them over the fourteen year pendency of this case.

Indeed, in order to follow the mandate of Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 64-66 (1966) that plaintiffs in libel actions arising out of labor disputes only recover upon proof of actual malice, a new trial was ordered in 1982. Tosti v. Ayik, 386 Mass. 721, 725 (1982) (Pet. App. A) (hereinafter Tosti I.) In compliance with this Court's mandate in Linn, supra, and Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, 287 n.17 (1974), that jury awards be scrupulously examined in order to protect the stability of labor unions and small employers, a remittitur was ordered in 1985 which resulted in the amount of damages found by the jury being cut almost in half. Tosti v.

Ayik, 394 Mass. 482, 499 (1985) (Pet. App. B) (hereinafter Tosti II).

In addition, the Local improperly attempts to interject arguments never previously raised before any trial or appellate court in this matter. The Local has never raised or attempted to prove the applicability of 29 U.S.C. sec.158(b)(1)(B) to the facts of this case. Indeed, the reason for this is that it simply does not apply. In footnote 16 of its Petition, the defendant for the first time attempts to argue that Tosti was an employer representative involved in the adjustment of union grievances. There was absolutely no evidence ever presented which would remotely lend itself to such a finding. The only description of Tosti's duties was that

he was a foreman of unlicensed drivers. There was no evidence that he was in any way designated, involved or had any responsibilities as an employer representative in the negotiation of collective bargaining agreements or the adjustment of grievances. Consequently, this is not a matter which could have been presented to the National Labor Relations Board (hereinafter NLRB) as a violation of 29 U.S.C. sec.158 (b)(1)(B).

This leads to another argument the Local attempts to present for the first time to this Court, namely, the argument that the plaintiff should not be allowed to recover damages for loss of income in the state court libel action because the NLRB could have awarded this type of damage if a violation of 29 U.S.C. sec.158(b)(1)(B) had been found. Not

only was this partial pre-emption argument never raised before, but also, as stated above, the applicability of 29 U.S.C. sec.158(b)(1)(B) was never argued, and further, there is no evidence to indicate this statute applied to Tosti.

Moreover, the Local improperly includes in its Petition irrelevant, inaccurate and inflammatory statements regarding the issuance by the Supreme Judicial Court of a stay of the execution pending consideration of this Petition by this Court, as well as intimations of the "imminent demise" of the Local and threats of bankruptcy. Since the issue of a stay of execution is not before this Court, these inflammatory and misleading statements regarding the stay and bankruptcy are

totally improper. Moreover, the Local's characterizations of the Supreme Judicial Court's motivation in initially issuing the stay are totally without foundation. Indeed, the Supreme Judicial Court has the matter of the continuation of the stay under consideration at this very time.

Due to the Local's complete failure to present any basis under Supreme Court Rule 17 for this Court to exercise it's discretion to grant this Petition, as well as its many attempts to abuse the appellate process by presenting arguments for the first time in this case's 14 year history to this Court, the respondent feels it would be appropriate for this Court to deny the Local's Petition solely on the basis of Supreme Court Rule 21.5.

Nothwithstanding the above, it is the respondent's position that all issues were correctly decided by the Supreme Judicial Court and there is consequently no basis for this Court to exercise its discretion in favor of granting this Petition.

Due to the obvious bias, inaccuracies and omissions in the Local's statement of the facts, the respondent is compelled to present the following statement of facts based upon the evidence presented at the March, 1983 jury trial.

This lawsuit arises out of the publication of an article in the United Auto Workers, Local 422 newspaper "The Conveyor". The article alleged that the plaintiff, Augustino Tosti, a management employee, had been performing bargaining

unit work in violation of the collective bargaining agreement. In addition and most importantly, the article alleged that the plaintiff was sending cars out into the marketplace with serious safety defects.

The incident related in this article, written by the co-defendant, Henry Ayik, a member and official of Local 422, allegedly occurred on June 7, 1971. At that time, the plaintiff was the foreman of unlicensed drivers. Henry Ayik was a stock chaser. Both were working in the "electrical hole". Cars with minor electrical malfunctions such as windshield wipers, tail lights or blowers, would be sent to the electrical hole for minor repairs before shipping. Henry Ayik would be sent to other parts of the plant by the

repairmen to "chase" the parts necessary to complete the repairs. It was Tosti's job to see to it that the repaired cars were driven out of the electrical hole for shipment.

On June 7, 1971, a car was sent to the electrical hole. The ticket on this car indicated that the heater blower was in need of repair. Tosti testified that he replaced the fuse, punched the ticket to indicate that the blower had been repaired and sent the car out for shipment. Although performing the repairs and punching the tickets was union work, there was testimony that this was commonly done by foremen such as Tosti and condoned by higher management.

Tosti testified that Henry Ayik watched him through the windshield of

the car as the plaintiff made the necessary repairs on this vehicle.

Henry Ayik testified that on June 7, 1971, as he was sitting on his mule (the motorized cart he used to chase stock) he watched Tosti go down a line of six cars, take the repair tickets off the windshield, take a punch out of his pocket and punch the repair ticket. Henry also testified that he confronted the plaintiff, took down the job numbers of the cars and informed the plaintiff he intended to file a grievance. Henry admitted he did not know how to read these tickets, and therefore had no idea what repairs were designated on the tickets.

Henry further testified that for the 15 minutes prior to making these observations of the plaintiff on June

7th, he was chasing stock in another part of the plant and had no opportunity to view the plaintiff in the electrical hole. When asked if the plaintiff had the opportunity to make the repairs on the vehicles during this time, Henry stated that he didn't believe the plaintiff knew how to make the repairs.

When asked why the repairs on the vehicles the plaintiff punched couldn't have been done by either the plaintiff or anyone else during the 15 minutes Henry was chasing stock prior to observing the plaintiff punching the tickets, Henry stated that they were not, and that the sole basis for this belief was his observations of the plaintiff over the three prior months, and not his actual observations of the night of June 7, 1971.

Henry testified that during the months of April and May, he observed the plaintiff two or three nights a week during the second (night) shift punching tickets on cars in the outside repair yard. Henry was sure all of these observations were at night during the second shift.

Tosti testified conclusively that he worked the day shift during the months Henry allegedly observed him punching without repairing. He unequivocally testified that he never punched an item on a ticket that he did not himself repair.

Henry Ayik testified that although the article makes reference to brakes and horns and he considers these items to be safety items on motor vehicles, he had absolutely no knowledge on June 7,

1971 whether any of the cars he allegedly saw the plaintiff punching had any safety problems or any improper repairs at all.

In fact, Henry Ayik admitted that he was not at all concerned with whether the part of the article accusing Tosti of approving for shipment cars with unrepaired safety defects was true or not. All he cared about was protecting union jobs:

A. (Henry Ayik): Sir, I wasn't complaining about the repair. I was only complaining about the punch. That's all I wanted taken away was the punch.

Q. (plaintiff's counsel): You weren't concerned that repairs were done or not done.

A. Correct. I wanted the punch taken away.

Q. And that was your only concern.

A. Yes, sir.

1983 Tr. 3-36.

Prior to the publication of this article, Tosti had a 23 year unblemished employment history with General Motors. The article which is the subject of this law suit was published on June 15, 1971. On this day, Tosti worked the second shift, reporting for work at 3:30 p.m. and returning home approximately 2:00 a.m. On June 16, 1971, the day after this article was distributed to both union and management personnel, Tosti was summoned to the Framingham General Motors plant manager's office at 9:00 or 10:00 a.m.; his regular shift was not to begin until 3:30 that afternoon.

At this meeting, reference was made to the Conveyor article, and the plaintiff was suspended until further notice. Two days later, on June 18, 1971, the plaintiff was again summoned to his superior's office where he was fired. The plaintiff testified that the June 15, 1971 Conveyor article written by the defendant, Henry Ayik, and published by the Local was the only matter discussed in connection with the plaintiff's suspension and subsequent termination.

In June of 1971, when this libelous article was published by the Local, Gus Tosti was a 44 year old man with 12 years of public education and some additional undefined schooling in the Armed Services. He had been born and raised in the Framingham area and had

established his own family in the same area. He had worked at the General Motors Assembly Plant in Framingham practically all his adult life, since he was 21 years old.

In 1971, Gus Tosti's family consisted of his wife, Lillian, and daughters Cynthia, then 20 years old, Roberta 19, and Lisa 7. He had been with the same employer for 23 years, made a decent base salary of $11,776.64, enjoyed the security of a pension plan, full medical insurance, life insurance and stock purchase program. Due to his unblemished employment record, Tosti had every reason to believe his job and benefits were secure.

In addition, although overtime was not guaranteed, in his 23 years with General Motors overtime had generally

been available during the months of September, October, November and December, when General Motors would begin production of the next year's models.

At this time, the plaintiff's financial condition was such that he, his wife, daughters Roberta, Lisa and grandson Paul, lived in an eight room colonial house in Holliston which the plaintiff owned, subject to a traditional bank mortgage, 6 miles from the General Motors plant. Previous to owning this home, he and his family had lived in another house he had been able to purchase. The family had also been able to send their eldest daughter, Cynthia, to nursing school.

At trial Mrs. Tosti testified that prior to the publication of this

libelous article, the Tosti's enjoyed a happy life, socialized with their many friends, were proud of owning their own home and their ability to provide their eldest daughter with the opportunity of formal post high school education which they did not have. After the article was published she testified everything changed. The family had to sell their home and borrow money from her parents to survive. They had no social life, no friends. There was just no comparison to their former lifestyle.

On June 15, 1971, this defamatory article was disseminated throughout the entire Framingham plant, to people Gus Tosti had worked with for 23 years. Due to the General Motors management's actions which the evidence revealed were undertaken solely on the basis of

reading this article, the plaintiff was never able to return to work to explain or dispute the article to his co-workers, associates and friends.

Upon being suspended, the plaintiff was very down but still hopeful his 23 year history with the company would prevail over the false accusations. When he was terminated by General Motors two days later, the evidence established that Tosti was visibly shaken, and very depressed. His wife testified that he couldn't believe it, was all shook up, couldn't talk and was close to tears.

After being fired by General Motors, the plaintiff made various attempts to get reinstated at General Motors, even approaching the Local for help. In what could be viewed by the fact finder as an attempt to mislead

him, Local officials assured him he would be back to work in a couple of weeks.

When he was unsuccessful in getting reinstated with General Motors, Gus Tosti tried for approximately 6 years to find comparable steady employment in the Framingham area but there was just no such work available for a man in his mid forties with very focused experience and only a high school education. The work he was able to get consisted of temporary construction jobs initially out of the laborer's union hall in Framingham during the balance of 1971 through 1972, earning him gross annual income in 1972 of $11,113.35, and then with a realty trust doing condominium maintenance repairs and odd jobs in 1973 and 1974, earning a gross annual income

of $6,189.60 and $13,909.50 respectively. In 1975, the plaintiff was able to earn only $2,414.80 and he was forced to sell the family home. After 1975, the plaintiff was never again able to afford to own a home for himself and his family. Since that time they have moved from one rented house to another. In 1976 the plaintiff was able to find temporary employment with Cumberland Farms while that company was constructing a bakery in Westboro, Massachusetts. This job lasted 15 to 18 months and through it he earned $12,660.05 in 1976 and $2,342.25 in 1977. When this job was over, Tosti was unable to find any work in the Framingham area. He went on unemployment for a period of time and finally decided to move his family to

Cape Cod, Massachusetts where he thought work would be available. In 1978 he was able to find work with Mid-Cape Development as a carpenter's helper, and earned a gross income of $6,938.00. He continued with Mid-Cape Development through part of 1979 earning $9,561.25 with them in that year. Some time in 1979 he found temporary work as a full carpenter with The Green Company building condominiums in Harwich. He earned an additional $4,189.50 in 1979 as a full carpenter. The job with the Green Company continued through 1980 and 1981 and the plaintiff earned $17,688.89 and $18,738.04, respectively in those years. Tosti continued to work for the Green Company until construction was finished and all workers were laid off. He received unemployment benefits of

$2,964.00 until he found his current position as a carpenter with the company of Marney and Canteine. His total earned income for 1982 amounted to $8,262.38. The plaintiff, at age 56 in 1983, was earning $7.00 per hour as a carpenter, compared to the $6.00 per hour plus benefits he earned at General Motors twelve years prior as a management employee.

SUMMARY OF ARGUMENT

I. The Massachusetts state court's jurisdiction over the plaintiff's state law libel claim is not totally or partially pre-empted by federal labor law because the state court meticulously followed this Court's mandates regarding the plaintiff's standard of proof in such cases, and further because the libelous portions of the incident

article involved no activity which could arguably have been brought before the NLRB as an unfair labor practice.

II. Where the author of the libelous article admitted that he did not know whether the libelous portions of his article were true or not and further testified that he did not care whether these portions of the article were true or false there is sufficient evidence to establish clearly and convincingly that he published the article either knowing the libelous protions were false, or with reckless disregard for whether they were true or false.

III. The evidence of special and general damages was more than adequate to support the amount of damages after assessment of a remittitur which cut the jury's verdict almost in half.

ARGUMENT

I. THE MASSACHUSETTS STATE COURT'S JURISDICTION OVER THE PLAINTIFF'S DEFAMATION CLAIM IS NOT PRE-EMPTED BY FEDERAL LABOR LAW.

The respondent defers to the Supreme Judicial Court's analysis of Federal pre-emption law as set forth in Tosti I and Tosti II (Pet. App. B and Pet. App. C). The Local attempts to avoid the clear rationale of Linn, supra, and its progeny by ignoring the libelous charges contained in the article, specifically, that the plaintiff was allowing cars with serious safety defects to be shipped from the General Motors plant and released into the marketplace, and focusing instead on the portions of the article which detailed the plaintiff's unauthorized use of a labor employee punch in

violation of the collective bargaining agreement. Whether or not the plaintiff violated the collective bargaining agreement was and is totally irrelevant to the plaintiff's libel action. In fact, the plaintiff admitted using the repair punch in violation of the agreement. If Henry Ayik had confined his article to this allegation, Tosti would not have spent the last 14 years litigating this action in the Massachusetts courts. But the article did not stop with complaining about unauthorized punching of repair tickets. It went on to falsely accuse the plaintiff of punching as repaired cars with serious safety defects and authorizing the shipment of these allegedly dangerous cars to dealers. It was this part of the article that was

false, malicious, libelous and which caused Tosti to lose his job of 23 years. This is a clear claim of libel, not an unfair labor practice in violation of the NLRA. As set forth infra, although there was evidence that Tosti was a management employee, there was absolutely no evidence that he was an employer representative with responsibility for adjusting grievances. He consequently was not in a position to present a violation of 29 U.S.C. sec.158(b)(1)(B) to the NLRB.

The central element of Tosti's state law libel claim is the falsity of the allegations made in the article and the publisher's knowledge or reckless disregard of the falsity of these allegations. The Local attempts to bring this case within the rationale of

Local 926, International Union of Operating Engineers v. Jones, 460 U.S. 669 (1983) despite the reaffirmance of the Linn case in footnote 11 of Jones, by attempting to convince this Court that the central element of the plaintiff's libel claim is whether the libelous article caused Tosti's discharge. Obviously however, this is but one element of the plaintiff's damages. The Local would still have libel judgment against it if Tosti had failed in this element of his proof of damages (which he did not).

Consequently, as the Supreme Judicial Court concluded in Tosti I and Tosti II, this case falls squarely within the rationale of Linn, supra, and the Massachusetts courts properly exercised jurisdiction over the plaintiff's libel claims.

II. THE EVIDENCE PRESENTED ESTABLISHED WITH CLEAR AND CONVINCING CLARITY THAT HENRY AYIK, A UNION OFFICIAL, EITHER KNEW THAT THE LIBELOUS STATEMENTS MADE IN THE ARTICLE WERE FALSE, OR ACTED WITH RECKLESS DISREGARD OF WHETHER THE STATEMENTS WERE TRUE OR FALSE.

The Local's contention that the evidence presented was "fatally deficient" to show either that Henry Ayik knew of the falsity of the statements made in the article, or acted in reckless disregard of the truth or falisty of the statements, can only be based upon its selective recollection of the evidence, especially the testimony of Henry Ayik himself.

As set forth supra at 10-14, not only was Henry not in a position to make the continuous observations of the plaintiff on June 7, 1971, which would have been required to substantiate the

allegation that Tosti had not made the necessary safety repairs, Ayik himself admitted that he simply did not care whether this part of his article, the part that caused Gus Tosti to lose his job of 23 years, was true or not! This evidence clearly and convincingly warrants the conclusion that Henry Ayik either knew these allegations were false or at the very least submitted the article for publication in reckless disregard of whether these serious allegations were true or false.

III. THE DAMAGES ASSESSED AFTER REMITTITUR ARE NO MORE THAN COMPENSATORY AND CLEARLY NOT IN EXCESS OF THE ACTUAL DAMAGES SUSTAINED BY TOSTI.

Initially, although the defendant continues to allege without any

foundation in fact that the two juries which heard this case held some kind of animus towards labor unions, it is difficult to understand how this remains at all relevant when what is being evaluated now is the amount of damages set by the special master, the former trial judge who saw the witnesses and heard all the evidence first hand. Surely the Local does not seek to imply that the special master was motivated by anti-union prejudice.

The Local limits its arguments regarding the amount of the damages to the $175,000.00 which represents damages for loss of the plaintiff's employment security and benefits and the general damages resulting from the malicious defamation, which include the general impairment of Tosti's reputation and

standing in the community, his consequent mental anguish and suffering, personal humiliation and alienation of associates.

In this case, the Local circulated this false, defamatory article throughout the entire General Motors plant in Framingham where Gus Tosti had worked for 23 out of his 44 years as of June, 1971. The Local disseminated the article indiscriminently among labor and management employees. There was evidence that there were over 3,000 union employees alone. The defamatory meaning of the article is clear on its face to anyone who reads it, in this case, the great number of people the plaintiff had worked with for 23 years. The shear number of people to whom the defamation was communicated, people who

knew the plaintiff, at least in his capacity as foreman at the plant for many years, is evidence of the harm done to the plaintiff's reputation.

Moreover, the General Motors' management's swift action undertaken solely as a result of this false article not only prevented Tosti from defending himself against the accusations, it also lent credence to the untrue allegations, further damaging his reputation.

In addition to the initial shock and depression the plaintiff suffered, also compensable is the mental anguish and suffering the plaintiff personally endured over the ensuing years as a result of the publication of these lies, including that occasioned as a result of watching his family suffer.

The plaintiff, at age 44, was

deprived of his career of 23 years as well as the security, both present and future, he had built up for himself and his family over those years. He was forced to uproot his family from an area they had spent their entire lives, relocate and spend years training and apprenticing in order to teach himself an entirely new occupation as a carpenter. After 12 years he had finally begun to earn a regular base salary within the range of that he was earning at the time he was fired. However, it is common knowledge that costs dramatically rose during this time, and, 12 years later, he still had no present or future benefits.

The financial hardship on the plaintiff's family is also readily apparent. Not only were they forced to

give up their home, they had to sell their personal belongings and borrow from relatives to survive. In addition, the plaintiff's youngest daughter was an impressionable seven years old when her father was fired. She has grown up watching her father fight to vindicate his name and to regain his self respect.

Rather than giving undue emphasis to the amount of the two jury awards that have not been allowed to stand for varying reasons, the plaintiff interprets the special master's recommendation as merely acknowledging that two separate juries watched and listened to the plaintiff's evidence and determined he had suffered substantial as opposed to nominal damages. This the plaintiff feels is entirely appropriate. (In this context it is

worthy of note that the defendant had never, at trial or on appeal, raised any issue with the trial judge's instructions as they relate to the assessment of damages).

Although it is true that both this Court and the Supreme Judicial Court have the duty to carefully review the amount of libel verdicts against unions, it must be remembered that this Court has also emphasized that "malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities." Linn, supra, at 63. The jury has found the Local responsible for publishing a malicious libel. It is time for the Local to now assume its responsibility and pay the plaintiff his just damages.

CONCLUSION

Based upon the foregoing, the respondent respectfully requests this Court deny the Local's Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,
The Respondent,
Augustino Tosti
By His Counsel

John J. C. Herlihy*
Karen M. Thursby
Herlihy and O'Brien
133 Federal Street
Boston, MA 02110
(617)426-6100

*Counsel of Record